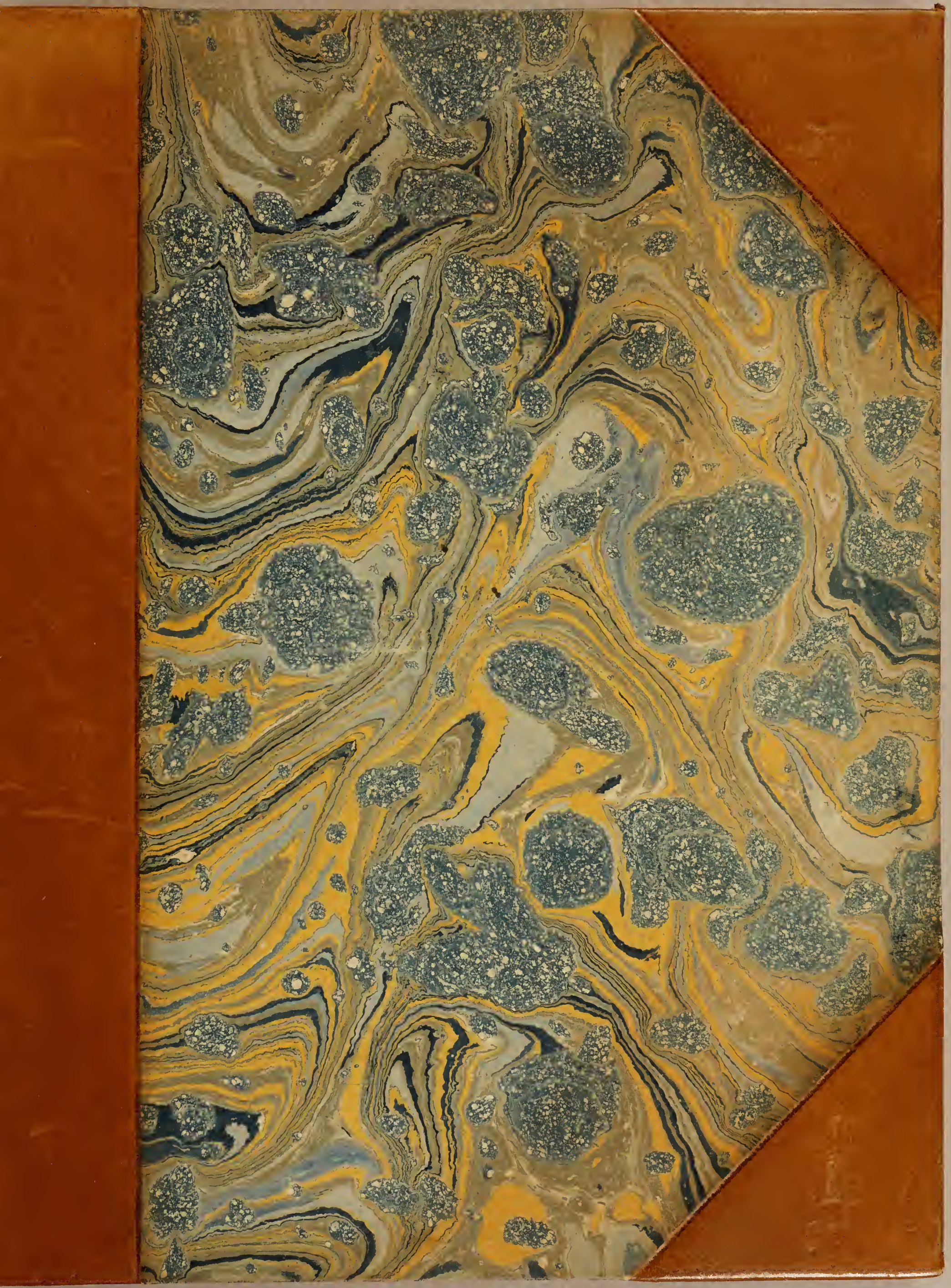

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NOVEMBER 25. 1767.

Unto the Right Honourable the Lords of Council and Seſſion,

THE PETITION

OF

DUNCAN CLARK, Merchant in *Rotterdam*;

Humbly ſheweth,

THAT *Daniel Clark*, a native of the ſhire of *Inverneſs*, died in the year 1757 at *Charleſtoun* in *South-Carolina*, poſſeſſed of a fortune of about 6 or 7000 *l. Sterling*, which he had acquired in trade. He left no iſſue; and his neareſt relations were a brother named *Alexander*, who lived near *Inverneſs*, a ſiſter named *Elizabeth*, and a niece named *Margaret*, by another ſiſter at that time dead.

A few days before his death, *Daniel* executed a will, by which he bequeathed 2000 *l. Sterling* to his brother *Alexander*; 200 *l. Sterling* to his niece *Margaret*; and 300 *l. Sterling* to her father, whoſe name was *Alexander Clark*. Beſides theſe more conſiderable legacies, he left many leſſer ones to different friends and acquaintances in *South-Carolina*.

After

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After paying all theſe different legacies, a conſiderable part of *Daniel Clark*'s fortune ſtill remained; and as his ſucceſſion was to be regulated by the law of *England*, that remaining part came to be divided equally between the brother *Alexander*, the ſiſter *Elizabeth*, and the niece *Margaret*, as coming in place of her deceaſed mother.

Immediately upon receiving intelligence of his brother's death, *Alexander* ſet out for *Carolina*, in order to examine the ſituation of his affairs, and recover as much of his fortune as he poſſibly could. After having accompliſhed this, he returned again to *Scotland;* and, anxious to preſerve to himſelf the whole ſucceſſion, he ſeems to have reſolved to defraud his ſiſter and niece of their juſt ſhares. For this purpoſe, he very carefully concealed from them the extent of his brother's fortune, and every tranſaction which had paſſed in *Carolina;* and was ſo ſucceſsful in his fraud, as to inſnare his ſiſter into a very unfair and unequal tranſaction. Fluſh'd with this ſucceſs, he proceeded with leſs caution towards the niece; and having endeavoured to abuſe her more openly, ſhe detected his fraud, and, in 1760, brought an action againſt him in this court, concluding, in the firſt place, for payment of her legacy of 200 *l. Sterling;* and, in the next place, for the ſum of 2000 *l. Sterling*, as her third ſhare of the fortune of her deceaſed uncle, remaining after payment of his debts, and of the different legacies bequeathed by him.

Upon this depending proceſs, ſhe obtained letters of inhibition againſt *Alexander Clark*, which were executed 20th *February*, and regiſtred 18th *March* 1762.

The proceſs againſt *Alexander Clark* having come before the late Lord Juſtice Clerk, Ordinary, his Lordſhip was
June 28. 1763. pleaſed, of this date, to pronounce an interlocutor, finding the purſuer intitled to her legacy of 200 *l. Sterling;* and, with regard to her third ſhare of the free reſidue of her uncle's fortune, before anſwer, remitting to the clerk of the

the proceſs to make out a ſtate of the remittances and payments made to *Alexander Clark*, and, at the ſame time, of the various deductions inſiſted for by him.

Soon after this interlocutor, the litigation between the parties ceaſed, by mutual agreement. After ſome communings, it was privately agreed, that *Alexander Clark* ſhould grant a bond for the ſum of 643 *l.* 9 *s.* 10 *d. Sterling*, as the third ſhare of the free reſidue of *Daniel Clark*'s effects, that had, at that time, been recovered by *Alexander Clark*; and, with reſpect to whatever farther might be claimed, and whatever farther queſtions might occur concerning this ſucceſſion, they were ſubmitted to the determination of arbiters. This agreement and ſubmiſſion was immediately extended and ſigned by the parties; and having been recovered by diligence at the petitioner's inſtance, is now in proceſs.

In conſequence of that agreement, *Alexander Clark* did, of this date, grant bond to *Margaret Clark* and her huſband, for the ſaid ſum of 643 *l.* 9 *s.* 10 *d. Sterling*; and, at the ſame time, in ſecurity thereof, aſſigned to them, *1ſt*, A bond for 100 *l. Sterling* due to him by *Dallas* of *Cantray*. *2dly*, A bill accepted by *Dallas* of *Cantray*, for 150 *l. Sterling*, with certain intereſts due on both. And *laſtly*, An heritable bond for 400 *l. Sterling*, on the eſtate of *Macintoſh* of *Farr*. July 8. 1763.

While matters remained in this ſituation, between *Margaret Clark* and her uncle *Alexander*, the petitioner, and his mother, who had imprudently advanced for him conſiderable ſums, became very preſſing and ſolicitous for payment, or, at leaſt, obtaining ſome ſecurity for their debt. In order to ſatisfy them, *Alexander Clark* propoſed to convey to them the heritable bond for 400 *l. Sterling* on the eſtate of *Farr*, which, it has been already mentioned, was aſſigned to *Margaret Clark* and her huſband, in ſecurity of the bond granted in *July* 1763.

As

As ſoon as *Margaret Clark*, and her huſband, received intelligence of this conveyance to the petitioner, they raiſed diligence againſt *Alexander Clark*, upon their bond and aſſignation in ſecurity; and threatened immediately to inſiſt in a reduction of the conveyance to the petitioner, in virtue of an inhibition which they raiſed and executed againſt *Alexander Clark*, upon the ſaid bond and aſſignation in ſecurity, prior to the conveyance in favour of the petitioner and his mother.

In order to prevent this, a meeting was brought about between *Alexander Clark* and *David Fraſer*, the huſband of *Margaret*, in *February* 1764. At this meeting it was agreed, that in full payment and ſatisfaction of the balance ſtill due upon the bond and aſſignation in ſecurity 1763, *Alexander Clark* ſhould draw a bill for the ſum of 377 *l.* 14 *s.* 1 *d. Sterling*, in favours of *David Fraſer*, on Meſſrs. *Hanſon*, *Clark*, and company, merchants in *London*, who then had money of his in their hands; and that, on the other hand, upon this bill's being duly paid, *David Fraſer* and his wife ſhould deliver up the extract, regiſtred bond and aſſignation, together with all the ſteps of diligence that had followed, or might follow thereupon; and grant a full acquittance and diſcharge of every thing due thereupon.

This bill for 377 *l.* 14 *s.* 1 *d. Sterling*, was accordingly preſented to Meſſrs. *Hanſon* and *Clark*; but altho' theſe gentlemen had in their hands money of *Alexander Clark*'s to a greater extent than the ſum drawn for; yet, there being then ſome danger of a claim againſt them from *Carolina*, upon his account, to a large extent, they were neceſſarily obliged to provide for their own ſafety, and therefore refuſed to accept this bill.

The bill having been thus diſhonoured, *Margaret Clark* and her huſband thought proper to return to their former plan, of inſiſting in a reduction of the conveyance to the petitioner;

petitioner; and, accordingly, in *January* 1765, they executed their ſummons of reduction.

The petitioner, finding himſelf thus in danger of being deprived of the ſecurity he had obtained for his juſt debt inſiſted that *Alexander Clark* ſhould either prevent the reduction that was threatened, or pay his debt out of ſome other fund. In this ſituation, it occurred, that the petitioner, who had ſome connections with Meſſrs. *Hanſon* and *Clark*, might be able to ſatisfy them, that there was no danger of the claim from *Carolina*; and might be able to prevail upon them to pay the 377 *l.* 14 *s.* 1 *d. Sterling*; and, accordingly, a new bill for that ſum was drawn in his favours upon theſe gentlemen, bearing date 28th *March* 1765. This bill, however, met with no better fate than the former, and was likewiſe diſhonoured.

But Meſſrs. *Hanſon* and *Clark* having ſince been entirely relieved from the *Carolina* claim, they in ſpring 1766, offered to honour either of the two draughts above mentioned, with the conſent of the holder of the other. As ſoon as the petitioner received intelligence of this, he offered to conſent that payment of this ſum ſhould be made to *Margaret Clark* and her huſband, on condition of their diſcharging their right to th eheritable bond, in terms of the tranſaction at the time of their getting the bill; or, if they choſe it rather, he was willing to yield up the heritable bond to them, upon condition of their conſenting to the draught in his favours being honoured. *Margaret Clark* and her huſband, however, would by no means liſten to either of theſe propoſals; and in *June* 1766 they thought proper to raiſe a proceſs of multiple-poinding in the names of Meſſrs. *Hanſon, Clark* and company, calling themſelves and the petitioner into the field. In the mean time, however, they indorſed their bill to *Simon Fraſer* merchant in *London*, who obtained payment, upon granting an obligation to Meſſrs. *Hanſon, Clark* and company, to procure them a ſuf-

ficient diſcharge, and a decreet of preference in the court of ſeſſion.

Margaret Clark and her husband having thus commenced theſe two proceſſes of reduction and multiple-poinding, thought proper likewiſe to revive the original proceſs againſt *Alexander Clark*, in which no ſtep whatever had been taken ſince the above mentioned interlocutor of the late Lord Juſtice-Clerk, of date the 28th *June* 1763; and your Lordſhips were pleaſed, of this date, to remit that proceſs to the preſent Lord Juſtice-Clerk.

19. July 1766.

In the proceſs of reduction above mentioned, although the ſummons had been executed ſo early as ſummer 1765, yet it was not called in court till *January* 1766, when it came before the Lord *Auchinleck* Ordinary, who was pleaſed, of this date, to remit it to the original proceſs againſt *Alexander Clark*, depending before the Lord Juſtice-Clerk.

2. Auguſt 1766.

The proceſs of multiple-poinding having come in courſe of the rolls before the Lord *Gardenſtoun*, Ordinary his Lordſhip was pleaſed, of this date, likewiſe to remit it to the original proceſs againſt *Alexander Clark*; and by this means all theſe three proceſſes were brought before the Lord Juſtice-Clerk.

1. Auguſt 1766.

From the narrative of facts already given in this petition, and from what ſhall be afterwards more fully ſet forth, your Lordſhips will clearly perceive the intimate connection of theſe three proceſſes with each other, and how neceſſary it was to have them joined together and brought before the ſame Ordinary. Notwithſtanding this, *Margaret Clark* and her husband were at much pains to keep them ſeparate, to bring them before different Ordinaries, in order to defeat, if poſſible, the arguments which the petitioner was to draw in his favour from the one proceſs to the other. Even after they were defeated in this attempt, from the apparent neceſſity of their being judged together,

ther, yet they laboured with much anxiety to keep them ſeparate before the Lord Juſtice-Clerk, and to prevent their being conjoined.

The petitioner, on the other hand, argued the neceſſity of conjoining the two proceſſes of reduction and multiple-poinding. He contended, That as he had, in the manner already explained in this petition, in payment of his juſt debt, obtained from *Alexander Clark*, firſt a conveyance to the heritable bond upon the eſtate of *Farr*, and afterwards, when likely to be deprived of any benefit from that conveyance by the reduction threatened by *Margaret Clark*, he obtained the bill upon Meſſrs. *Hanſon* and *Clark*; ſo he was willing to give up either of the two, upon *Margaret Clark* and her husband's yielding up and diſcharging all claim to the other. He maintained, that *Margaret Clark* and her husband were not intitled to graſp at both the heritable bond by the reduction, and likewiſe the preference in the multiple-poinding; but muſt, in terms of the agreement in *February* 1764, diſcharge their claim to the heritable bond, upon obtaining a preference to the ſum in the hands of *Hanſon* and *Clark*.

After adviſing full memorials for parties, the Lord Ordinary was pleaſed, of this date, to pronounce the following interlocutor: "Having conſidered the memorial for "*Margaret Clark* and *David Fraſer* her husband, and *Si-* "*mon Fraſer* their indorſee, and alſo the memorial for "*Duncan Clark* merchant in *Rotterdam*, finds Meſſrs. *Han-* "*ſon, Clark* and company, raiſers of the multiple-poind- "ing, liable in once and ſingle payment; and prefers the "ſaid *Simon Fraſer* upon the funds in the hands of the "raiſers of the multiple-poinding, for payment to him of the "principal of 377 *l.* 14 *s.* 1 *d. Sterling*, and intereſt due "thereon, contained in the bill drawn by the ſaid *Alex-* "*ander Clark*, upon the ſaid Meſſrs. *Hanſon, Clark* and "company, bearing date the 17th of *February* 1764, in- "dorſed to the ſaid *Simon Fraſer*, and proteſted at his in- "ſtance, 1. July 1767.

" ſtance, for not payment; and decerns in the preference,
" and for payment accordingly. And in regard it ap-
" pears that the ſaid *Duncan Clark*, being in the knowledge
" of the above bill drawn by *Alexander Clark* upon Meſſrs.
" *Hanſon, Clark* and company, did afterwards elicit from
" the ſaid *Alexander Clark* a ſecond draught upon the ſaids
" Meſſrs. *Hanſon, Clark* and company, for the ſame ſum,
" and thereby gave occaſion to the raiſing of this multiple-
" poinding, and to the competition which has enſued
" thereupon; therefore finds the ſaid *Duncan Clark* liable
" for the expence of the multiple-poinding, and alſo for
" the expence of proceſs incurred by the ſaid *Simon Fraſer*
" in diſcuſſing his preference; and ordains an accompt
" thereof to be given in: And finds, that the ſaid *Marga-*
" *ret Clark* and her husband are not obliged, *in hoc ſtatu*, to
" diſcharge their proceſs of reduction againſt the ſaid
" *Duncan Clark* for reducing the aſſignation to the heritable
" bond due by *Macintoſh* of *Farr;* reſerving, nevertheleſs,
" to the ſaid *Duncan Clark*, his defences againſt the ſaid re-
" duction, and alſo to inſiſt for abſolvitor from the ſaid re-
" duction, upon his ſhowing, that the ſaid *Margaret Clark*
" and her husband have no further intereſt in the ſaid
" bond."

Againſt this interlocutor the petitioner offered a repre-
ſentation, which the Lord Ordinary having conſidered, to-
31 July 1767. gether with anſwers, he was pleaſed, of this date, to pro-
nounce the following interlocutor: " Having conſidered
" this repreſentation, with the anſwers thereto, refuſes the
" deſire of the repreſentation, and adheres to the former
" interlocutor; but finds, that upon payment by *Hanſon*
" and *Clark*, of the contents of their bill, as decerned for,
" *David Fraſer* is bound to deliver up the bond granted
" by *Alexander Clark* to *David Fraſer* and his, wife, for
" 643 *l.* 9 *s.* 10 *d. Sterling*, with the aſſignation to *Farr*'s
" bond in ſecurity thereof, and haill diligence following
"th ereon, and to diſcharge the ſame in terms of the ſaid

" *David*

" *David Fraſer*'s obligation to the ſaid *Alexander Clark*, in " that behalf."

Againſt this interlocutor the petitioner offered a repreſentation, which the Lord Ordinary having conſidered, he was pleaſed, of this date, to refuſe it without anſwers.

11. Auguſt 1767.

Againſt theſe interlocutors of the Lord Ordinary, the petitioner begs leave to reclaim to your Lordſhips. In order to explain the point now in controverſy, he has been obliged to trouble you with a detail of the various diſputes which aroſe concerning the ſucceſſion of *Daniel Clark*, who died in *South Carolina*. From the whole, you will readily perceive in what manner the petitioner has unfortunately come to be involved in theſe diſputes; and he apprehends the whole matter now in controverſy comes to a very ſhort queſtion. The petitioner, a juſt and lawful creditor of *Alexander Clark*, obtained in payment of it a conveyance to an heritable bond; but was ſoon after likely to be deprived of it by another creditor, who had obtained a prior aſſignation to that bond in ſecurity, and had thereupon raiſed inhibition. In order to prevent the petitioner's being deprived of it, the debtor ſatisfies the other creditor with giving him a bill for the balance due him on a banker at *London*, upon receiving payment of which the creditor promiſes to diſcharge his claim to the heritable bond; but from particular accidents at the time, the bill is diſhonoured, and he recurs again to his claim to the bond: Then, in order to relieve the petitioner, the debitor gives him a draught for the money in the banker's hands, becauſe he had reaſon to expect the petitioner might be able to obtain payment. This bill is alſo diſhonoured; but ſoon after, the banker offers to pay the money to either of the holders of theſe bill, with the conſent of the other. The petitioner offers to reſign either the bond or bill, upon his being made ſure of the other: But the other creditor, re-

ſorting to other pretended grounds of debt, ſeparate from thoſe for which he had obtained the aſſignation in ſecurity, refuſes to yield up either the one or the other; he will not diſcharge his claim to the heritable bond; and, at the ſame time, he inſiſts on being preferred to the ſum in the hands of the banker, though the bill was given ſolely upon the condition of giving up the bond. The queſtion then is, Whether this creditor is to be permitted, contrary to expreſs agreement, to graſp at both theſe ſubjects, and to diſappoint the petitioner of payment of his juſt debt? Or, to apply it particularly to the preſent caſe, Whether *Margaret Clark* and her huſband are intitled to inſiſt for a preference in the multiple-poinding, without at the ſame time diſcharging all claim to the heritable bond upon the eſtate of *Farr?*

The petitioner ſhall, in the *firſt* place, conſider the foundations upon which the proceſs of reduction reſts, and ſhall endeavour to ſhow, that upon obtaining payment of the bill upon *Hanſon* and *Clark*, they are entirely deſtroyed, and taken away. And in the *next* place, he ſhall endeavour to ſhow, That *Margaret Clark* and her huſband muſt, upon being preferred in the multiple-poinding to the ſum in the hands of *Hanſon* and *Clark*, not only diſcharge their claim to the heritable bond, in conſequence of the aſſignation in ſecurity 1763, but likewiſe all right and claim to it whatever.

As their title in the proceſs of reduction, *Margaret Clark* and her huſband found upon the bond and prior aſſignation in ſecurity, granted by *Alexander Clark* in *July* 1763, and inhibition raiſed thereon; and likewiſe, upon an inhibition executed againſt *Alexander Clark* as far back as the year 1762, upon the original depending proceſs already mentioned to have been brought againſt him at that time in this court.

With

With reſpect to the former, the petitioner has, in the narrative of facts, already informed your Lordſhips, That in order to prevent this proceſs of reduction, when it was firſt threatened, a meeting was brought about in *February* 1764, between *Alexander Clark*, and *David Fraſer* the huſband of *Margaret*. At this meeting your Lordſhips have likewiſe been informed, that *Margaret Clark* and her huſband got the bill for 377 *l.* 14 *s.* 1 *d. ſterling*, upon Meſſrs. *Hanſon, Clark* and company; and became bound, upon the receiving payment of the contents of that bill, to diſcharge their claim to the heritable bond upon the eſtate of *Farr*. The cleareſt evidence of this agreement, ariſes from papers recovered by the petitioner, upon a diligence granted by the Lord Ordinary, and produced in proceſs. Theſe are, in the *firſt* place, A letter from *Duncan Grant* writer in *Inverneſs*, to Mr. *John Fraſer* writer to the ſignet, agent for *David Fraſer* and *Margaret Clark*, incloſing the bill for 377 *l.* 14 *s.* 1 *d.* upon Meſſrs. *Hanſon* and *Clark*, giving an account of the tranſactions at the meeting of parties, at which that bill was granted; and incloſing a copy of the receipt and obligation which *David Fraſer* granted to *Alexander Clark*, upon receiving the bill above mentioned. This copy of the receipt and obligation is likewiſe produced; and in it *David Fraſer* acknowledges, his having then received from *Alexander Clark* the bill above mentioned; and upon that draught's being duly honoured, he promiſes and obliges himſelf, "to deliver up to *Alexander Clark* the extract regiſtrate bond and aſſignation granted by him to me and my ſpouſe, with all the ſteps of diligence that has followed, or might follow thereupon, and an ample acquittance and diſcharge of the premiſes, agreeable to the advice and opinion of the ſaid Mr. *John Fraſer*; which diſcharge to be made out by him at ſight, and to the liking of Mr. *Robert Donaldſon* writer in *Edinburgh*." Together with theſe papers, there is likewiſe produced a

ſcroll

ſcroll of a diſcharge, made out by Mr. *John Fraſer* in terms of the obligation juſt now recited; but which was never extended or executed, as the bill on Meſſrs. *Hanſon, Clark* and company, happened to be diſhonoured. In that ſcroll, however, after having ſet forth the bond and aſſignation in ſecurity, granted in *July* 1763, the agreement of parties in *February* 1764, and the bill then granted by Meſſrs. *Hanſon* and *Clark*, are contained the following words: "Therefore wit ye us, to have exonered and diſcharged, as I the "ſaid *David Fraſer*, with advice and conſent of my ſaid "ſpouſe; and I the ſaid *David Fraſer*, as taking burden "upon me for her, and both of us with one conſent and "aſſent, by theſe preſents, *exoner, quit claim, and* ſimpli- "citer *diſcharge* the ſaid *Alexander Clark*, his heirs, execu- "tors and ſucceſſors, under the reſervations after mention- "ed, of the foreſaid principal ſum of 643 *l.* 9 *s.* 10 *d.* "*ſterling*, as contained in, and due by the foreſaid bond "granted by the ſaid *Alexander Clark* to us, and of the pe- "nalty therein contained, *and of the ſaid bond itſelf, and* "*haill diligence following thereupon, for now and ever,* "*and likewiſe of the foreſaid aſſignation in ſecurity, grant-* "*ed by the ſaid* Alexander Clark." The reſervations here mentioned are, the right of *Margaret Clark* and her huſband to the other bond and bill, due by *Dallas* of *Cantray*, which were aſſigned to them at the ſame time with the ſaid heritable bond on the eſtate of *Farr*, in ſecurity of the bond for 643 *l.* 9 *s.* 10 *d. Sterling*, granted in *July* 1763.

From all theſe different pieces of evidence, it clearly appears, that it was the agreement of parties, that *Margaret Clark* and her huſband ſhould diſcharge their claim to the heritable bond, upon receiving the contents of the bill upon Meſſrs. *Hanſon* and *Clark*. It is clear, therefore, that they could not inſiſt on payment of that bill, without at the ſame time performing the obligation, upon condition

of

of which it had been granted. The Lord Ordinary has accordingly found, that upon receiving payment of that bill, they muſt deliver up the bond granted by *Alexander Clark* in *July* 1763, together with the aſſignation to *Farr's* bond in ſecurity thereof; and therefore it is unneceſſary for the petitioner to trouble your Lordſhips with any farther argument upon this point. He ſhall endeavour by and by to ſhow your Lordſhips, that *Margaret Clark* and her huſband, in conſequence of the agreement above mentioned, muſt not only diſcharge their claim to this heritable bond, in conſequence of their prior aſſignation above mentioned, but alſo, all claim and right to it whatever; and it was therefore neceſſary in this place, to explain at length the particulars of that agreement, and the evidence from which the nature of it appears.

In the *next* place, With reſpect to the old inhibition which *Margaret Clark* and her huſband have likewiſe founded upon as a ſeparate title in the proceſs of reduction, it is to be obſerved, That this inhibition was raiſed and executed upon the dependence of the original proceſs, brought in this court againſt *Alexander Clark*, long previous to the tranſaction and ſubmiſſion in *July* 1763, whereby they accepted of the bond of 643 *l.* 9 *s.* 10 *d.* and aſſignation in ſecurity, and departed from the proceſs.

Your Lordſhips have already been informed, that in *July* 1763, ſoon after the interlocutor of the late Lord Juſtice Clerk, above mentioned, the litigation in that original proceſs ceaſed, by the mutual agreement of parties: They entered into a private tranſaction, by which it was agreed, that *Alexander Clark* ſhould immediately grant bond to *Margaret* for 643 *l.* 9 *s.* 10 *d. Sterling*, and that all farther diſputes between them ſhould be ſubmitted to the determination of arbiters. Your Lordſhips have likewiſe been informed, that a bond was accordingly granted by *Alexander Clark* for that ſum; and that, in ſecurity there-

of, he, at the ſame time, aſſigned ſeveral bonds and bills, among which was the heritable bond upon the eſtate of *Farr* now in queſtion. The petitioner, therefore, humbly apprehends, that by this private tranſaction and ſubmiſſion to arbiters, the original proceſs was entirely departed from and taken away; and that, conſequently, the inhibition founded upon it neceſſarily fell to the ground. He apprehends nothing to be more clearly eſtabliſhed in law, than that when an inhibition is founded upon a depending proceſs, it muſt neceſſarily fall to the ground, whenever that proceſs upon which it reſts is diſcharged or taken away. In letters of inhibition raiſed upon a depending proceſs, it is neceſſary that the dependence of that proceſs ſhould be expreſly and particularly mentioned as the foundation of uſing that diligence; and as an inhibition is merely a prohibitory diligence, ſo, it is only by a decreet afterwards obtained in the depending proceſs, that the inhibiter can poſſibly proceed to reduce any alienation made to his prejudice by the debtor. If, therefore, the proceſs ſhall be either altogether renounced or given up, or virtually renounced and diſcharged by a ſubmiſſion or private tranſaction, the petitioner apprehends, that, in conſequence thereof, the inhibition founded upon it muſt neceſſarily fall to the ground, and be no longer of any avail, as it would from thence clearly appear, that no decreet could ever be obtained in that proceſs.

The petitioner, therefore, apprehends, that as, in the preſent caſe, the litigation in the original proceſs ceaſed in *July* 1763: So, by the private tranſaction at that time, and the ſubmiſſion to arbiters, that proceſs was virtually renounced and entirely departed from; and conſequently, the inhibition founded upon it neceſſarily fell to the ground, and cannot now be admitted to ſupport the preſent proceſs of reduction.

But

But farther, the petitioner apprehends, that from *Margaret Clark*'s accepting the aſſignation to this heritable bond, in ſecurity of the bond for 643 *l.* 9 *s.* 10 *d. Sterling*, ſhe clearly acknowledged, that ſhe then underſtood the original proceſs, and every conſequence of it, to be entirely taken away, and at an end. If ſhe had at that time underſtood her inhibition ſtill to have remained in force, and conſequently to have ſecured to her that fund, there was ſurely no neceſſity for her accepting the aſſignation to it; and therefore, by accepting that aſſignation, ſhe clearly departed from any title ſhe had to it in conſequence of the inhibition. What farther confirms this, is, that from the time of the private tranſaction in *July* 1763, no ſtep whatever was taken in that original proceſs for near three years, when it was again revived for very obvious purpoſes, which ſhall be immediately mentioned.

For, when *Margaret Clark* and her huſband lately reſolved to inſiſt in the reduction of the petitioner's aſſignation to the heritable bond upon the eſtate of *Farr*, upon the title of their old inhibition on the depending proceſs, they were aware of the defence which would ariſe from this circumſtance of the original proceſs having been virtually diſcharged and taken away. The method which they deviſed, therefore, in order to obviate this difficulty, was to execute a ſummons of wakening of that original proceſs againſt *Alexander Clark*. When, however, they came to inſiſt in that cauſe before the Lord Ordinary, they did not inſiſt for any ſhare of the ſucceſſion of *Daniel Clark*, of which *Alexander* had attained poſſeſſion before the commencement of the original proceſs itſelf, or of which, during the dependence of that proceſs, there had been evidence produced of his having received; but they threw out a vague general allegation, that *Alexander Clark* had then lately remitted to him from *Carolina* 800 *l. Sterling* of his

his brother's fortune; and they inſiſted, as, by the interlocutor of the late Lord Juſtice Clerk, the laſt ſtep taken in the proceſs, was a remit to the clerk to make out an accompt of the remittances made from *Carolina* to *Alexander Clark*; ſo, the preſent Lord Ordinary ſhould of new appoint the clerk to make out that accompt, and to charge *Alexander Clark* with 800 *l. Sterling*, beſides what appeared from the evidence already produced in proceſs. As this allegation was thrown out without the leaſt veſtige of evidence to ſupport it, the petitioner oppoſed it in a repreſentation; and the Lord Ordinary having been accordingly pleaſed to ſtop that remit, no farther procedure has occurred in that proceſs.

But farther, even ſuppoſing that this after remittance of 800 *l.* could be fully inſtructed, yet the petitioner humbly apprehends, that the action now inſiſted in by *Margaret Clark* for her proportion of that ſum, cannot poſſibly ſupport the inhibition raiſed upon the proceſs formerly depending, nor the reduction founded upon that inhibition. For, in the *firſt* place, the petitioner has endeavoured to ſatisfy your Lordſhips, that the original proceſs was entirely departed from and taken away; and he therefore apprehends, that the proceſs now inſiſted in for this 800 *l.* muſt be conſidered as a new proceſs, entirely ſeparate and diſtinct from the former. And, in the *next* place, from attending to the ſubſumption of the libel in the former proceſs, upon which the inhibition was raiſed, we perceive it bears, that *Alexander Clark* had actually uplifted ſuch and ſuch particular ſums preceeding that date, and concludes for the purſuer's ſhare of the ſums ſo uplifted. The petitioner, therefore, apprehends, that an inhibition raiſed upon that proceſs could only ſecure to the creditor the ſums ſpecially claimed in that proceſs: And allowing the proceſs now revived to ſupport the inhibition raiſed

raiſed upon the proceſs formerly depending, would be in effect admitting, that an inhibition upon a depending proceſs would not only ſecure the ſums then due, and claimed in that proceſs, but would farther ſecure any other debt that might eventually or accidentally afterwards appear to be due by the defender to that purſuer.

The petitioner has thus endeavoured to ſhow, that, neither upon the footing of the prior aſſignation in ſecurity, nor upon the footing of the inhibition raiſed upon the original depending proceſs againſt *Alexander Clark*, *Margaret Clark* and her huſband are founded in their reduction of his aſſignation to the heritable bond upon the eſtate of *Farr*. It only remains to ſhow, that *Margaret Clark* and her huſband, upon being preferred in the multiple-poinding to the ſum in the hands of Meſſrs. *Hanſon*, *Clark* and company, muſt, *in hoc ſtatu*, abſolutely diſcharge all right and claim of every kind to the heritable bond.

In the *firſt* place, the petitioner has already endeavoured to explain the nature of the private tranſaction of parties in *July* 1763, and in *February* 1764. He has endeavoured to ſhow, that at the time of the tranſaction in *July* 1763, the original proceſs againſt *Alexander Clark* was underſtood to be entirely departed from and taken away; and he has farther ſhown, that by accepting the aſſignation in ſecurity to the heritable bond, *Margaret Clark* and her huſband themſelves underſtood this to be the caſe. He has farther ſhown, that by the tranſaction in *February* 1764, this was ſtill more clearly underſtood to be the caſe. Beſides the proof already ſtated, with regard to this tranſaction, there is another piece of evidence produced in proceſs, which it is now proper to mention. When the bill granted to *Margaret Clark*, and her husband, on *Hanſon* and *Clark* was diſhonoured, becauſe of the claim which they dreaded from *Carolina*, on *Alexander Clark*'s account; the petitioner having reaſon to believe, that there could be no danger from that claim, wrote a letter to *Hanſon* and *Clark*, obliging himſelf to ſecure them againſt it, to the extent of the contents of the bill. This letter is produced, and together with it, a letter in conſequence of it, from

David Fraſer, the huſband of *Margaret Clark*, to the petitioner, in which he writes as follows: " Sir, as you have granted the above letter for the purpoſes mentioned, and in order to give me acceſs to the above ſum, I hereby promiſe and obliige me, that neither I, or my heirs, *&c.* ſhall trouble or recur on you, for, or on account of any ſhare or intereſt, otherwiſe due or competent to me, in or to that ſum of 370 *l.* 14 *s.* 3 *d. Sterling* money." It is to be obſerved, that the petitioner could have no other intereſt in granting this letter, than to give *Margaret Clark*, and her huſband, acceſs to the ſum in the bill, and by that means, to preſerve to himſelf the heritable bond. It was for that end the tranſaction had been ſet on foot, and the bill had been granted; and the words of the letter of *David Fraſer* above quoted, can imply nothing elſe, but diſcharging their claim to the heritable bond, the ſole condition upon which they had received the bill.

In the next place, the petitioner humbly apprehends it will clearly appear, that not only was it the expreſs agreement of parties, that the right of *Margaret Clark*, and her huſband, to *Farr*'s heritable bond ſhould be diſcharged; but further, that at the time of that tranſaction, it was underſtood by all parties, that her only right to that bond was the aſſignation in ſecurity; and that any right which ſhe had, in conſequence of the inhibition founded upon the original proceſs, was entirely at an end. This appears, in the firſt place, from the circumſtances above mentioned, of the litigation in the original proceſs having ceaſed, and the diſpute's having been ſubmitted to the deciſion of arbiters. It appears ſtill further, from the concluſion of this ſummons of reduction itſelf, which is reſtricted in the following manner: " Ay and until the purſuers be paid of the ſums, in *ſecurity of which, the diſpoſition* (*i. e.* the aſſignation in ſecurity,) *in their favours was granted*;" which plainly ſhow, that the purſuers conſidered themſelves as no farther intitled to inſiſt, than to the effect of recovering payment of the ſums due to them, upon *Alexander Clark*'s bond and aſſignation in ſecurity. In the next place, this is ſtill farther confirmed, from conſidering how

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uſeleſs and ineffectual the whole tranſaction muſt have been, if *Margaret Clark*, and her huſband, had conſidered themſelves to have had another ſeparate title to the heritable bond, beſides the aſſignation in ſecurity. For if, after diſcharging that, they conſidered themſelves ſtill to have had a title to it upon the footing of the old inhibition, it could be of no manner of conſequence to renounce their claim to it upon the footing of the aſſignation; they ſurely will not acknowledge, that in all this tranſaction they were deceiving and cheating the petitioner; and yet this muſt have been the caſe, if, when they were amuſing him with the diſcharge of their right by the aſſignation in ſecurity, they ſtill conſidered themſelves to hold the heritable bond by the inhibition.

The petitioner, therefore, apprehends it to be clear, that, in the *firſt* place, the bill was granted ſolely upon the condition of their diſcharging all claim of every kind to the heritable bond; becauſe, otherwiſe, their diſcharge would be ineffectual: And, in the *next* place, that, in fact, at the time of the tranſaction now mentioned, they themſelves underſtood the aſſignation in ſecurity, to be their only title; he, therefore, apprehends he is well entitled to maintain, that *Margaret Clark*, and her huſband, cannot obtain a preference to the ſum in the hands of *Hanſon* and *Clark*, unleſs they ſhall comply with the condition upon which alone they received the bill, and renounce entirely all right whatever to *Farr*'s heritable bond. To ſatisfy your Lordſhips ſtill further of this, the petitioner begs you will atteend to the conſequences which neceſſarily would have followed *Margaret Clark* and her huſband's having prevailed in their reduction of his aſſignation to the heritable bond, before they engaged in this conteſt in the multiple-poinding. In that event, it is apprehended the petitioner might with juſtice have argued, that as they had received that bill upon a certain condition which they had not fulfilled; ſo they could not now derive any benefit from it. He might have urged, that as after having counteracted the condition upon which alone they had received it, and, therefore, having given up any title to

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the bill, another bill for that ſum had been granted to him, ſo he was intitled to oppoſe their claim. The only circumſtance which could ſupport their claim of preference, was not their bill, granted upon a condition which they had not performed, but legal diligence, if they either had, or poſſibly could have affected that ſubject by any ſuch. This, however, they cannot even alledge; and the petitioner, therefore, apprehends, that they cannot obtain a preference in the multiple-poinding, without, at the very ſame time, diſcharging their proceſs of reduction, and all claim whatever to the heritable bond, the ſole condition upon which their bill was granted.

If, therefore, the petitioner has ſatisfied your Lordſhips, that in the event now mentioned, of their having prevailed in the reduction, they could not have been entitled to a preference in the multiple-poinding: He apprehends, that your Lordſhips will not permit them, from ſhaping their cauſe in their own way, and beginning with the multiple-poinding, to graſp at both funds, and diſappoint a co-creditor of payment of his juſt debt. If you ſhall be of opinion, that they are not bound *in hoc ſtatu*, to diſcharge the reduction, and all claims to the heritable bond; he apprehends, he is entitled to oppoſe the preference they claim, to the ſum in the hands of *Hanſon* and *Clark*, as they have clearly counteracted the expreſs condition upon which alone they received the bill, and are entitled to inſiſt for payment.

The petitioner might ſtill further endeavour to ſupport the arguments which he has here maintained; and he might ſhow, that, from a variety of circumſtances, there is much reaſon to believe, that the 643 *l.* 9 *s.* 10 *d. Sterling*, was *Margaret*'s full ſhare of the effects of her uncle, which ſhe can inſtruct to have been received by *Alexander Clark*; and your Lordſhips will obſerve, that even, independent of *Farr*'s heritable bond, ſhe will, by the bill on Meſſrs. *Hanſon* and *Clark*, receive payment of every ſhilling that is due to her of that ſum. From the ſuſpicious character of *Alexander Clark*, ſhe ſtill however ſuſpects ſome yet undiſcovered fraudulent concealment; and ſhe endeavours to keep alive

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the original proceſs, and its conſequences, merely from the vain expectation of ſome time or other detecting this hidden treaſure. When, therefore, they ſhall become ſatisfied, that they have diſcovered *all*, it ſeems impoſſible to determine. Your Lordſhips know they cannot proceed in the reduction, till they ſhall have obtained a decreet in the original proceſs; and from the manner in which they have hitherto proceeded in that proceſs, it does not appear when it is to have an end; ſo that according to their preſent plan, they might endeavour to keep this reduction hanging over the petitioner's head for many years yet to come, and thereby not only prevent him from obtaining payment of his juſt debt, but keep him in perfect uncertainty, whether he ſhall ever recover it or not.

In the courſe of proceedings before the Lord Ordinary, much clamour was thrown out againſt the petitioner, and much pains taken to create a belief, that he had, by improper means, obtained the conveyance to the heritable bond, and had afterwards, in an undue manner, elicited the ſecond bill upon *Hanſon* and *Clark*. Theſe allegations, however, were not ſupported by any evidence; and the petitioner hopes, that, in the narrative of facts already given in this petition, he has clearly ſhown, that his conduct was in no reſpect improper; and that he was all along, honeſtly and fairly endeavouring to obtain payment of, or ſecurity for his lawful debt. He obtained the conveyance to the heritable bond, at a time when it has been ſhown, the original proceſs and every conſequence of it, were underſtood to be entirely at an end; and though this bond had been previouſly aſſigned to *Margaret Clark* and her huſband, yet it was only aſſigned to them in ſecurity; and at the ſame time *Alexander Clark* pointed out to him other funds, from which he could eaſily pay the balance due to them, which was ſomewhat leſs than the contents of the heritable bond; nor could the petitioner, at any

rate, hope to avail himſelf in the leaſt of his conveyance to the heritable bond, till the contents of the bond, and aſſignation in ſecurity were firſt cleared, becauſe of the inhibition raiſed thereon, antecedent to his conveyance, ſo that nothing unfair could poſſibly be intended by his taking that conveyance. In the *next* place, with reſpect to the ſecond draught upon *Hanſon* and *Clark*, your Lordſhips will obſerve, that it was more than a year poſterior to the firſt draught, in favours of *Margaret Clark* and her huſband, had been refuſed, for the firſt was dated in *February* 1764, and the ſecond only in *March* 1765. It is to be obſerved likewiſe, that when he received this ſecond draught, the firſt was underſtood to be no longer of any avail; as by that time *Margaret Clark* had recurred to the proceſs of reduction, and therefore had failed to perform the condition upon which alone ſhe could hold the bill. Beſides, it is to be further obſerved, that there were particular circumſtances, which made it likely, that the petitioner would be able to obtain payment of the ſecond bill, although the firſt had been diſhonoured; and if he had ſucceeded, it was intended to be applied towards the payment of *Margaret Clark* and her huſband, in order to procure a diſcharge of her claim to the heritable bond.

In the *laſt* place, the petitioner hopes, that your Lordſhips will alter the interlocutor of the Lord Ordinary, in ſo far as it has found him liable in expences. He has ſhown your Lordſhips, that his conduct has been in no degree improper, either in obtaining the conveyance to the heritable bond, or the ſecond bill upon *Hanſon and Clark*. Your Lordſhips will further obſerve, that he has ſhown himſelf in no degree diſpoſed to litigation, as immediately upon Meſſrs. *Hanſon* and *Clark* offering to pay the contents of the bill for 317 *l.* 14 *s.* 1 *d. Sterling*, he offered to conſent to *Margaret Clark*'s preference in the multiplepoinding, upon the condition of her diſcharging her claim

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to the heritable bond, in terms of the original agreement, or if ſhe choſe it rather, he was willing to yield the heritable bond, on her conſenting to his preference in the multiplepoinding. In place, however, of agreeing to this equitable propoſal, *Margaret Clark* and her huſband, endeavoured to graſp at both, in a manner, which the petitioner hopes he has ſhown your Lordſhips was unjuſt, and contrary to the expreſs terms of agreement. It is further to be obſerved, that in the courſe of this litigation, *Margaret Clark* and her huſband have uſed every artifice in their power to keep theſe proceſſes ſeparate, which the petitioner has ſhown your Lordſhips are ſo intimately and inſeparably connected. In the *next* place, it is to be remarked, that *Margaret Clark* and her huſband moſt anxiouſly concealed every paper which could tend to throw light upon their private tranſactions with *Alexander Clark*; and the petitioner has been obliged to force every one of them from them, by a diligence granted by the Lord Ordinary. This conduct, on their part, was not only highly improper, and even vaxatious; but their anxiety to conceal the particulars of theſe tranſactions, and ſhut out the light, ſhow their conſciouſneſs, that theſe tranſactions if clearly explained, would defeat their own plea, and ſupport that of the petitioner. From all theſe circumſtances, he hopes your Lordſhips will be ſatisfied, that his conduct has been in no degree ſuch as to ſubject him to expences; and that on the contrary, the whole proceedings of his adverſaries have been ſuch as ought juſtly to load them with the expences of this litigation.

The petitioner has thus, upon various grounds, endeavoured to ſatisfy your Lordſhips, that, in the *firſt* place, *Margaret Clark* and her huſband have no title to inſiſt in the proceſs of reduction, either upon the footing of the prior aſſignation in ſecurity, or upon the footing of the inhibition, raiſed upon the original depending proceſs, againſt *Alexander Clark*. He has, in the *next* place, endeavoured

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voured to ſhow, that *Margaret Clark* and her huſband, in conſequence of the private agreement in *February* 1764, were not only obliged to diſcharge their claim to *Farr*'s heritable bond, in conſequence of the aſſignation, but likewiſe to diſcharge all right and claim to it of every kind whatever. He has, *laſtly*, endeavoured to obviate the clamour of his adverſaries, and to ſhow that his conduct has been in no degree improper or blameable; and that therefore, he ought not to be found liable in expences, while on the contrary, the conduct of his adverſaries has been ſuch, as ought juſtly to ſubject them to expences.

May it therefore pleaſe your Lordſhips, to alter the interlocutors of the Lord Ordinary above recited; to conjoin the proceſſes of reduction and multiple-poinding; and to find, that Margaret Clark *and her husband cannot be preferred to the ſum in the hands of Meſſrs.* Hanſon, Clark *and company, unleſs they at the ſame time diſcharge the proceſs of reduction, and all right and claim of every kind which they may pretend to have to the heritable bond on the eſtate of* Farr: *Or,* 2do, *To find, That if* Margaret Clark *and her husband are not bound,* in hoc ſtatu, *to diſcharge the proceſs of reduction, and all claim to the heritable bond, they are not intitled to a preference in the multiple-poinding. And,* 3tio, *To aſſoilzie the petitioner from expences; and to find* Margaret Clark *and her husband liable to the petitioner in expences; at leaſt, that they are not entitled to the expence of the proceſs of multiple-poinding, which they raiſed unneceſſarily.*

According to juſtice, *&c.*

ROBERT CULLEN.

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